

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

**BRIAN F. NETTLETON and
MISTI M. NETTLETON,**

Debtors.

Case No. **01-22917-13**

MEMORANDUM OF DECISION

At Butte in said District this 10th day of March, 2006.

On September 27, 2001, Debtors filed this chapter 13 case. On April 25, 2002, this Court issued an order confirming their chapter 13 plan. Their plan was modified, by order of this Court, on May 3, 2002. On January 4, 2006, R. Clifton Caughron (“Caughron”), Debtors’ attorney, of Helena, Montana, filed an application for compensation requesting \$2,442.17 for fees and \$384.89 in costs. Robert G. Drummond, chapter 13 trustee (“trustee”), of Great Falls, Montana, filed an objection on January 11, 2006, and requested a hearing for February 7, 2006. The United States Trustee has not filed any response to the application for fees and costs. On February 3, 2006, trustee filed a notice of completion of plan payments and the Court issued an

order discharging debtor after completion of Debtors' plan. On February 6, 2006, Caughron filed an amended application requesting total fees in the amount of \$2,204.75 and total costs in the amount of \$384.89. Caughron received a retainer of \$575.00 for fees and \$300.00 for costs. Caughron received, through the plan, payment for fees in the amount of \$1175.00. Caughron is, through the amended application, requesting the allowance of unpaid fees in the amount of \$454.75 and costs in the amount of \$84.89. Trustee has disbursed all plan payments. At the hearing on February 7, 2006, and as stated in the amended fee application, Caughron states that the Debtors have no objection to the additional fees and are willing to pay the additional amounts not paid through the plan if allowed by the Court.

At the hearing, Caughron appeared and argued his respective position. Trustee appeared and stated that he objected to the application based upon his filed response that the plan is insufficiently funded to pay the administrative expense requested by Caughron. This memorandum contains the Court's findings of fact and conclusions of law.

Based upon the Court's independent review of the file, the detail provided, the nature and extent of the services rendered, and the lack of any substantive objections to the services incurred, the Court finds, after completing its independent review, that the services rendered by Caughron and his firm are reasonable and necessary. The Court allows the requested fees and costs, even though Caughron provides no explanation as to why his requested fees at the hourly rate of \$150.00 are reduced from 11.46 hours in the original application to 9.90 hours in the amended application. The Court provides the following discussion, given the Trustee's objection that Debtors' payments under the plan are completed and a modification of the plan at this late date is no longer possible. All time entries provided in the amended application involve time

increments from September 27, 2001, through August 5, 2004, for Caughron and his staff.

Caughron provides no explanation as to why he waited approximately 3 2/3 years after the plan was modified on May 3, 2003, to file his fee application to request fees in addition to the presumed fee provided in Mont. LBR 2016-1(b).

DISCUSSION

Judge Keith M. Lundin in his treatise states, “[a]dministrative expenses are not particularly well managed by the Bankruptcy Code in Chapter 13 cases.” KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY, 3d ed. § 359.1, p. 359-1, (2000 & Supp. 2004).

It is not obvious that administrative expenses are discharged in a Chapter 13 case either at the completion of payments under § 1328(a)[] or at hardship discharge under § 1328(b).[] The discharge in § 1328 extends to “debts” provided for by the plan or disallowed under § 502. Administrative expenses are not prepetition debts or claims of the sort defined in 11 U.S.C. §§ 101(5) and (12).[] Administrative expenses typically are not treated as postpetition debts in a Chapter 13 case for purposes of § 1305, even though administrative expenses and postpetition debts may overlap in a Chapter 13 case.[] Administrative expenses are not allowed or disallowed under § 502; instead, administrative expenses are requested, allowed or disallowed under § 503 of the Code.[] (footnotes omitted).

Id. “Debtors’ attorneys’ fees in a Chapter 13 case are awarded under § 330 and are defined as administrative expenses by § 503(b)(2).[] It is generally held that attorneys’ fees for services during a Chapter 13 case are not postpetition claims under § 1305.[]” *Id.*

If attorneys’ fees are priority *claims* rather than administrative *expenses*, then an unpaid fee is dischargeable on the same terms as any other priority claim. But if administrative expenses are not priority claims, are attorneys’ fees discharged at the completion of payments under the plan if no request for payment is made by the debtor’s attorney or fees remain unpaid through the plan? There is no specific provision of the Code that discharges whatever portion of an allowed *expense* for attorneys’ fees remains unpaid at the end of a Chapter 13 case.

Id. at 359-2.¹

As noted by Judge Lundin in his treatise, courts have used three approaches in considering postpetition fees in a chapter 13 context. The approaches are: (1) allowed administrative expenses are not discharged in a chapter 13 case, *Jensen v. Gantz (In re Gantz)*, 209 B.R. 999 (10th Cir. BAP 1997); (2) allowed administrative expenses provided in a confirmed plan are discharged upon completion of the plan payments, *In re Hanson*, 223 B.R. 775 (Bankr. D. Or. 1998); and (3) allowed administrative expenses are priority claims and if insufficient time remains to pay the administrative expenses through the confirmed plan then a judgment may be entered directly against the debtor and collectible by counsel presumably postdischarge, *Cornelison v. Wallace (In re Cornelison)*, 202 B.R. 991 (D. Kan. 1996).

In *Gantz*, 209 B.R. at 1001, the trial court disallowed a portion of the fees requested by debtor's attorney. Later, debtor's attorney requested the debtor to pay the disallowed fees after the plan payments had been completed and a discharge had been entered, discharging all debts provided for by the plan. In its analysis, the bankruptcy appellate panel instructively stated,

Generally, a debtor is discharged in Chapter 13 of any prepetition debt provided for in the plan or *disallowed* under 11 U.S.C. § 502. 11 U.S.C. § 1328. Attorney's fees are allowed (or denied) under 11 U.S.C. § 330, and to the extent that they are rendered and allowed in connection with the bankruptcy case, are administrative expenses. Section 503(b)(2) incorporates 11 U.S.C. § 330. Simply put, the Code does not discharge fees awarded under 11 U.S.C. § 330. Rather, fees are disallowed, allowed as an administrative expense, or allowed but must be paid by the debtor directly and not from the estate. Here, the fees Jensen now seeks to collect from the debtor were disallowed – thus there was nothing to discharge.

¹ The Court notes that 11 U.S.C. § 507(a) states, “The following expenses and claims have priority in the following order” Section 1322(a)(2) states, “provide for the full payment, in deferred cash payment, of all claims entitled to priority under section 507” The words, “*expenses* and *claims*” are not included in both sections.

Gantz, 209 B.R. at 1003. *See also In re Nilges*, 301 B.R. 321, 325 (Bankr. N.D. Iowa 2003).

In *Hansen*, debtor's attorney, after the debtor completed his plan payments and received a discharge, mailed a bill for services rendered requesting the payment of additional fees not allowed and paid through the plan. The attorney then turned the matter over to collection. Debtor informed the court of the attorney's request for fees and the U.S. Trustee objected to such additional fees. The bankruptcy court concluded that the confirmed plan provided for the postconfirmation services of the debtor's attorney and the chapter 13 discharge barred the collection of the postconfirmation fees. The court commented that an attorney could seek approval of the postpetition fees and have them paid through the plan. If the requested and allowed fees arise late in the duration of the plan then the debtor could propose to pay them in a balloon payment or in larger payments at the end of the plan or could reaffirm the fees. *Hansen*, 223 B.R. at 780 (court clarifies in note 13 on said page the difference between reaffirmation in chapters 7 and 13 when considering postpetition fees.). The court concluded, "Postconfirmation attorney fees of Chapter 13 debtors' counsel are administrative expenses. Because administrative expenses are provided for in the plans, any unpaid debt for such expenses was discharged under section 1328(a) and (c)." *Id.* at 781.

In *Cornelison*, debtor's attorney, near the end of the term of the confirmed plan requested additional fees. After objection by the trustee, the bankruptcy court allowed the fees, refused to order the fees paid through the plan, given the short remaining duration of the plan and directed that the attorney could have judgment against debtors for the collection of the allowed additional fees. The district court affirmed the bankruptcy court.

Based upon the foregoing discussion, statutory and case authority and the analysis by Judge Lundin in his treatise, this Court, given the allowance of the requested fees, concludes that such allowed fees cannot be paid through the confirmed plan as it has been completed and a discharge has been entered. Debtors may voluntarily agree to pay the fees postdischarge, but have no legal obligation to do so. *See* 11 U.S.C. § 524(f). This Court will not enter a postconfirmation judgment requiring debtors to pay such fees, when the debtors' attorney did not seek approval of such fees for approximately 3 2/3 years after confirmation. If a more timely request had been filed the allowed fees could have been paid through the confirmed plan. The Court holds that if additional fees are allowed and the F.R.B.P. 2016(b) statement and the plan provide for the payment of additional fees upon approval of the court, such allowed fees shall be paid through the plan provided the remaining plan term is sufficiently long to pay such allowed fees or a lump sum/balloon payment for such fees may be paid through a modification of the plan. If the plan term is insufficient to pay fees allowed late in the plan term, any unpaid allowed fees shall be discharged upon the entry of the discharge unless the debtor voluntarily wishes to pay such allowed fee after discharge is entered. As a note, if the additional fees are disallowed by the court, such disallowed fees are not payable by debtor either during the plan or after discharge is entered in a chapter 13 case, unless debtor voluntarily wishes to pay such fees after discharge is entered; however, no legal obligation to pay disallowed fees postdischarge will be imposed. The Court adopts this holding and follows this policy so the debtor's attorney is required to seek approval of fees and costs for services rendered during the plan term and does not intentionally or unintentionally surprise the debtor with a request for fees and costs postdischarge and after the case is closed. An attorney could exert inappropriate postdischarge

leverage on the debtor to pay such fees without the debtor knowing whether the court had allowed such fees and costs.

As noted by Judge Lundin in his treatise: “This is not a pretty picture. . . . The Code should be clarified to discharge Chapter 13 administrative expenses provided for by the plan or disallowed under § 503.” KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY, 3d ed. § 359.1, p. 359-4,(2000 & Supp. 2004)

IT IS ORDERED that a separate order will be entered providing that R. Clifton Caughron’s amended application for fees and costs is allowed; that trustee’s objection is sustained; that R. Clifton Caughron’s application for all fees, including the unpaid fees in the amount of \$454.75 and costs in the amount of \$84.89 is granted; that the allowed unpaid fees and costs shall not be paid through Debtors’ confirmed plan as Debtors completed their plan and the Court entered Debtors’ discharge; that such allowed and unpaid fees are discharged as they were provided for by the confirmed plan even though unpaid, unless Debtors wish to voluntarily pay such allowed fees and costs postdischarge.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana